FILED
FEB 17 1961
JAMES R. BROWNING, Clerk

No. [redacted] 39

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL., *Respondents*

---

## BRIEF FOR LOCAL 476 OF THE UNITED ASSOCIATION IN OPPOSITION

---

MARTIN F. O'DONOGHUE
831 Tower Building
Washington 5, D. C.

DONALD J. CAPUANO

*Counsel for Respondents*

SHERWOOD & CLIFFORD
1003 Turks Head Building
Providence, Rhode Island

*Of Counsel*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Reasons for denying the writ | 4 |
| Conclusion | 9 |
| Appendices | 10 |


## TABLE OF CASES

Cases:


| | |
|---|---|
| *Communication Workers* v. *National Labor Relations Board*, 362 U.S. 479 | 5 |
| *De Sylva* v. *Ballantine*, 351 U.S. 570 | 5 |
| *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55 | 5 |
| *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378 | 4 |
| *International Brotherhood of Electrical Workers and Langer*, 82 NLRB 1028 | 7 |
| *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694 | 6, 7 |
| *Labor Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 | 7 |
| *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 | 7 |
| *McCullough* v. *Kammerer Corp.*, 323 U.S. 327 | 4 |
| *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241 | 5 |
| *Michel* v. *Louisiana*, 350 U.S. 91 | 5, 6 |
| *National Labor Relations Board* v. *Brandman Iron Co.*, Petition for Certiorari pending, No. 646 this term | 2, 4, 9 |
| *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426 | 7 |
| *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 331 U.S. 416 | 7 |

Page

*National Labor Relations Board* v. *Las Vegas Sand and Gravel Corp.*, Petition for Certiorari pending, No. 655 this term ..... 1, 4, 6, 9
*National Labor Relations Board* v. *Local 926, Operating Engineers*, 267 F. 2d 418 (5th Cir., 1959) .... 7
*National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563 ..... 8, 9
*National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, Petition for Certiorari pending, No. 654 this term ..... 1, 4, 6, 9
*United States* v. *Atkinson*, 297 U.S. 157 ..... 9

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*):

Section 8(b)(4)(A) ..... 2
Section 10(e) ..... 2, 4, 6, 7

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

---

No. 656

---

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL., *Respondents*

---

## BRIEF FOR LOCAL 476 OF THE UNITED ASSOCIATION IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals enforcing the Board's Order with modifications (Pet. Br. pp. 7-11) is reported at 280 F. 2d 441. The opinion denying the Board's petition for rehearing is reported at 283 F. 2d 26.[1] The findings of fact, conclusions of law and order

[1] In ruling on the petition for rehearing, the Court issued a joint opinion disposing of seven cases. The Board has petitioned for certiorari in three of those cases: *NLRB* v. *Ochoa Fertilizer Corp.*, No. 654; *NLRB* v. *Las Vegas Sand and Gravel Corp.*, No. 655, and the instant case. The opinion of the Court is printed in the Appendix to the Board's petition in *Ochoa Fertilizer Corp.*, *supra*.

of the Board (R. 1-13, 19-21)[2] are reported at 124 NLRB 538.

## JURISDICTION

The Court of Appeals entered its decree on July 18, 1960 (Pet. pp. 11-12), and denied the Board's petition for rehearing on October 18, 1960 (Pet. p. 13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

## QUESTION PRESENTED

Upon the basis of the record made below, no question is presented for consideration by the Court in this case.

## STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 146, as amended 29 U.S.C. § 160), appear at pages 14 and 15 of the Board's petition for certiorari in *National Labor Relations Board* v. *Brandman Iron Company*, No. 646, this term.

## STATEMENT

The Respondents, after hearing, were found to have violated Section 8(b)(4)(A) of the National Labor Relations Act. The Trial Examiner found that the Respondents had induced and encouraged the employees of Cuddigan, a subcontractor, to engage in a strike or a concerted refusal to work on a construction project in order to compel Cuddigan to cease doing business with Turgeon, the general contractor. As a result of

[2] "R" refers to the printed appendix to Petitioner's Brief in the Court of Appeals, certified to this Court.

the above finding, the Trial Examiner recommended the following order:

> "1. Cease and desist from engaging in, or inducing or encouraging the employees of Joseph P. Cuddigan, Inc. *or any other employer* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Joseph P. Cuddigan, Inc.; *or any other employer or person* to cease doing business with E. Turgeon Construction Co. Inc." (R. 11; emphasis supplied).

The Trial Examiner also recommended the usual posting but the notice did not conform to the recommended order. The recommendation in the notice was broader than the recommended order in that after "E. Turgeon Construction Co. Inc.", the phrase "*or any company or person*" was added. (R. 13).

Respondents filed exceptions to several of the rulings and findings of the Trial Examiner, including an exception to the broad recommendation embodied in the notice and its inconsistency with the recommended order (R. 14, 15). Thereafter, the Board entered an order "adopting the findings and recommendations of the Trial Examiner" but in fact the Board adopted the broad recommendation of the Trial Examiner included in the notice as its order rather than the Trial Examiner's Recommended Order.[3]

[3] The Board Order if enforced, would have subjected the Union to contempt proceedings—not a Board hearing—for any action the Board might consider secondary against *any employer, company or person* presumably anywhere in the nation ad infinitum.

The Board's petition for enforcement was granted by the First Circuit but the Board's order was modified by striking all references to "or of any other employer," "or any other employer or person" and "or any other company or person" (Pet. pp. 11-12). The Board's petition for rehearing was denied by the court in a joint opinion.[4]

## REASONS FOR DENYING THE WRIT

1. There is no question presented by the proceedings below which is properly before this Court.

The Board states that the question presented here is whether a court of appeals under Section 10(e) of the Act can modify a Board order in the absence of exceptions to the Trial Examiner's recommended order. This question may be involved in the other cases in which the Board is simultaneously seeking certiorari[5] but it is not presented in this case because the Board did not raise the point in any of the proceedings in the court below. This Court has repeatedly held that where the only question raised by the petition for certiorari was not raised in the court below, the petition will be denied. *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, and *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378. The Court, in *McCullough*, in dismissing the petition as being improvidently granted, stated:

---

[4] See note 1, *supra*. On rehearing the Board abandoned the "or any other company or person" clause of its order. The *Ochoa Fertilizer* and *Las Vegas Sand and Gravel* cases, unlike the instant case, involve modifications by the court of broad orders entered by the Board with the consent of the respondents as part of stipulated settlements.

[5] See Note 1, *supra*, and *Brandman Iron Company*, No. 646

> "Thus, the only question for which we granted certiorari is one not properly raised, litigated or passed upon below." 323 U.S. at 328.

See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55; *DeSylva* v. *Ballantine*, 351 U.S. 570; *Michel* v. *Louisiana*, 350 U.S. 91; *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241.

There is no valid reason for the Board's failure to raise, in the court below, the issue it presently asks this Court to determine. From the very beginning of the enforcement proceedings in the circuit court, the Board was aware that the Respondent resisted enforcement on the grounds, *inter alia*, that the order of the Board was too broad in scope. In its brief in support of its petition for enforcement,[6] the Board defended the scope of its order, *not* on the ground that the circuit court had no "power" to modify the order because no exceptions were taken to the Trial Examiner's recommended order, but on the ground that there was substantial evidence in the record to warrant the issuance of a broad order. Respondent, in its brief to the court below, clearly resisted enforcement of the order on the ground that the broad order was not appropriate on the basis of the evidence submitted at hearing (Resp. Br. Ct. of App., pp. 9, 13-16).

After the court modified the order, finding it inappropriate, *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, the Board filed for rehearing and again defended its Order on the ground that the record supported the necessity for a broad

[6] Bd. Br. Ct. of Ap. pp. 11, 13-14. The briefs of the Board and Respondents in the Court of Appeals and the Board's petition for rehearing have been certified to this Court.

order. Neither in the petition for rehearing nor in its initial brief did the Board make any argument which could even be remotely considered to be an objection to the Court modifying the Board's order in the absence of exceptions to the Trial Examiner's report. In view of the Petitioner's complete failure to raise this question below, irregardless of the merits of its position, this Court will not review the question. *Michel* v. *Louisiana*, *supra* at 101.

The opinion below *in this case* did not discuss the point now raised. The Court, in its joint opinion, did discuss the question but not in regard to the instant case. The joint opinion was issued only because

> "The questions presented by the several motions are not identical but they all involve the appropriate breadth of a particular order", 283 F. 2d at 27.

The *Ochoa* and *Las Vegas* cases, unlike the instant case, involved modification of consent Board orders entered pursuant to settlement stipulations. The court discussed the cases separately and considered its authority under Section 10(c) only with regard to the consent cases.[7]

---

[7] The Board asserts as one of the reasons for granting the writ that the decision of the court below, in limiting the breadth of the Board's order, is contrary to settled authority, citing *I.B.E.W.* v. *N.L.R.B.*, 341 U.S. 694. It does not appear, however, that the Board is seeking certiorari on the ground that the court below erred in limiting the scope of the Board's order but rather that certiorari is sought only on the question of whether the court in these circumstances had the *power* to modify the order. However, even assuming that the Board is also asking for a review on the merits of the Board order based on *I.B.E.W.* v. *N.L.R.B.*, *supra*, certiorari should still be denied. The cases are not in conflict and the *I.B.E.W.* case is not controlling here. There a broad order

2. The most important ingredient of Petitioner's question, on the lower court's power under Section 10(e) of the Act, is the failure to object to the recommended order before the Board. Even assuming a proper objection was not made to the recommended order, Petitioner's question is not properly before this Court. The Board did not adopt that order but changed it, increasing its scope. Since the Board issued a *different* order than the Trial Examiner, naturally no objection could be made to it before the Board and the court could modify the order since timely objections were raised at the first opportunity—on the petition for enforcement. The limitation on court review in Section 10(e) would not apply in this situation. *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 331 U.S. 416, 427.

3. The Board has abused its administrative processes in this case and such practices should not be sanctioned

---

was appropriate. The record contained evidence of a long standing dispute between the union and the primary employer. 391 U.S. at 696. See *I.B.E.W. and Langer*, 82 NLRB 1028, 1039 (I.B.). Here, the court below found that "neither the trial examiner nor the Board made any finding relating to the likelihood of similar violations by respondents." 280 F. 2d at 443. The court also properly refused to consider a prior settlement stipulation as evidence of a past dispute. *N.L.R.B.* v. *Local 926, Operating Eng.*, 267 F. 2d 418 (5th Cir., 1959). In any event *I.B.E.W.* v. *N.L.R.B.*, *supra*, certainly did not hold that a broad order was required in every secondary boycott case. See *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426. Further, this Court will not review a decision of a court of appeals involving a fair assessment of the record on the issue of substantiality of evidence supporting a Board order. *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502, and, since the scope of this order affects only private parties rather than principles important to the public, certiorari should be denied on this point. *Layne and Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393.

by this Court. Prior to the issuance of a complaint here, Respondents offered to enter into an informal settlement with the Board. This was rejected (R. 18). On May 11, 1959, after issuance of the Intermediate Report, the Board asked the Respondents to comply with the Recommended Order and avoid further formal action. This offer was accepted by Respondents (R. 17). One day before exceptions to the Intermediate Report were due, the Board repudiated its offer (after acceptance) on grounds which the court below considered to be without merit.[8]

After enforcement with modification was granted, the Board notified Respondents what action was necessary for compliance (Appendix A, *infra*, pp. 10-11). The Respondents immediately complied. (Appendix B, *infra*, p. 11) Shortly thereafter, the Board petitioned for rehearing. Then, ten days after the court denied the petition for rehearing, the Board notified Respondents that the case was *closed* (except for future violations) since Respondents had fully complied with the court's order. (Appendix C, *infra*, p. 12). Nearly three months later, the Respondents received the Board's petition for certiorari.

While the Act does not require the Board to play hide and seek with those guilty of unfair practices,[9] it would seem that justice demands that those charged need not be compelled to play such a game with the Board. This appears to be a case of the left hand of the Board not knowing what the right hand is doing and vice versa. This Court should not sanction

---

[8] See note 7, *supra*; R. 18 and 45.

[9] *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567.

such loose and irresponsible practices on the part of a governmental agency.

Respondents realize that a case does not become moot because a Board order is complied with during enforcement proceedings, *Mexia Textile Mills, supra*, but here Respondents complied with a Court order and were notified that the case was closed. In view of the conduct of the Board here, the Court should deny the writ out of a "consideration of fairness to the [lower] court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson*, 297 U.S. 157, 159.[10]

## CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

MARTIN F. O'DONOGHUE
831 Tower Building
Washington 5, D. C.

DONALD J. CAPUANO

*Counsel for Respondents*

SHERWOOD & CLIFFORD
1003 Turks Head Building
Providence, Rhode Island

*Of Counsel*

[10] Furthermore, assuming the Board is correct in stating this case involves the same issue presented in *Brandman Iron Co.*, No. 646; *Ochoa Fertilizer Corp.*, No. 654, and *Las Vegas Sand and Gravel Co.*, No. 655, there does not appear to be any reason at all why certiorari should be granted in this case.

## APPENDIX A

[LETTERHEAD—NATIONAL LABOR RELATIONS BOARD]

July 25, 1960

Local 476, United Association of Journeymen
& Apprentices of the Plumbing and Pipefitting
Industry of the United States and Canada,
AFL-CIO and Its Business Agent, William O'Brien
85 Broadway
Providence, Rhode Island

RE: Local 476, United Association of Plumbing,
etc. & Its Agent William O'Brien (E. Turgeon
Construction Co., Inc.)—Case No. 1-CC-224

Gentlemen:

You have recently received the Decree of the Circuit Court of Appeals in the above case. Pursuant thereto, you are required to notify us within fifteen days what steps you have taken or will take to comply. I trust that within this period I will be able to report to the Board that you have taken the required action so that further formal proceedings can be avoided.

To assist you in effecting compliance, I have assigned Examiner Martin P. Burns, who will contact you in the near future; in the interim, if you have any questions, please write or telephone the assigned Board Agent.

Kindly advise us how many copies of the Notice you will need in order to comply with the Decree and we will send the requisite number to you immediately.

If and when you have fully complied with the affirmative terms of the Decree and there are no reported violations of its negative provisions, we shall notify you that the case has been "closed" on compliance. Until you receive such notice, you will know the case

still remains open on our records for all purposes as awaiting compliance.,

Yours very truly,

BERNARD L. ALPERT
Regional Director

cc to Raymond E. Jordan, Esquire
Sherwood & Clifford
1003 Turks Head Building
Providence, Rhode Island

---

## APPENDIX B

[LETTERHEAD—SHERWOOD & CLIFFORD, ATTORNEYS AT LAW]

September 30, 1960

National Labor Relations Board
First Region
24 School Street
Boston 8, Massachusetts

Attention: Martin B. Burns, Field Examiner

Re: National Labor Relations Board, Petitioner vs. United Association of Journeymen & Apprentices of the Plumbing, etc., et al, Respondents C.C.A. No. 5590 Your case No. 1-CC-224

Gentlemen:

In the above entitled matter we do hereby inform you that we have fully complied with the posting requirements as set forth in your letter of July 28, 1960, said posting having commenced on July 29, 1960.

Very truly yours,

Local 476, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO

WILLIAM M. O'BRIEN, Business Agent

By their attorneys,

WAC emb

## APPENDIX C

[LETTERHEAD—NATIONAL LABOR RELATIONS BOARD]

October 28, 1960

Local 476, United Association of Journeymen
and Apprentices of the Plumbing and Pipefitting
Industry of the United States and Canada, AFL-CIO
85 Broadway
Providence, Rhode Island

Attention of William O'Brien, Business Agent

Re: Local 476, United Association of Journeymen, etc. (Rhode Island Chapter, Associated General Contractors of America, Inc.)—
Case No. 1-CC-224
(E. Turgeon Construction Co., Inc.)

Gentlemen:

The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed.

Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur.

Yours very truly,

BERNARD L. ALPERT
Regional Director

cc to Sherwood & Clifford
Executive Secretary,
National Labor Relations Board,
Washington 25, D. C.

Rhode Island Chapter, Associated General
Contractors of America, Inc.